

**REMARKS**

The Office Action dated December 8, 2009, has been received and carefully considered. Reconsideration of the current rejections in the present application is also respectfully requested based on the following remarks.<sup>1</sup>

I. THE OBVIOUSNESS REJECTION OF CLAIMS 26-29, 32, 38-47, 54-61, 63-65, 69, 71, AND 73

On pages 3-5 of the Office Action, claims 26-29, 32, 38-47, 54-61, 63-65, 69, 71, and 73 were rejected under 35 USC § 103(a) as being unpatentable over U.S. Publication No. 2003/0167380 ("Green") in view of U.S. Patent No. 6,598,131 ("Kedem"). This rejection is hereby respectfully traversed.

Under 35 U.S.C. § 103, the Patent Office bears the burden of establishing a prima facie case of obviousness. In re Fine, 837 F.2d 1071, 1074 (Fed. Cir. 1988). There are four separate factual inquiries to consider in making an obviousness determination: (1) the scope and content of the prior art; (2)

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<sup>1</sup> As Applicants' remarks with respect to the Examiner's rejections are sufficient to overcome these rejections, Applicants' silence as to assertions made by the Examiner in the Office Action or certain requirements that may be applicable to such rejections (e.g., assertions regarding dependent claims, whether a reference constitutes prior art, whether references are legally combinable for obviousness purposes) is not a concession by Applicants that such assertions are accurate or such requirements have been met, and Applicants reserve the right to analyze and dispute such in the future.

the level of ordinary skill in the field of the invention; (3) the differences between the claimed invention and the prior art; and (4) the existence of any objective evidence, or "secondary considerations," of non-obviousness. Graham v. John Deere Co., 383 U.S. 1, 17-18 (1966); see also KSR Int'l Co. v. Teleflex Inc., 127 S. Ct. 1727 (2007). An "expansive and flexible approach" should be applied when determining obviousness based on a combination of prior art references. KSR, 127 S. Ct. at 1739. However, a claimed invention combining multiple known elements is not rendered obvious simply because each element was known independently in the prior art. Id. at 1741. Rather, there must still be some "reason that would have prompted" a person of ordinary skill in the art to combine the elements in the specific way that he or she did. Id.; In re Icon Health & Fitness, Inc., 496 F.3d 1374, 1380 (Fed. Cir. 2007). Also, modification of a prior art reference may be obvious only if there exists a reason that would have prompted a person of ordinary skill to make the change. KSR, 127 S. Ct. at 1740-41.

As stated in MPEP § 2143, to establish a prima facie case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine

reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. The teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, not in applicant's disclosure. In re Vaeck, 947 F.2d 488 (Fed. Cir. 1991).

As stated in MPEP § 2143.03, to establish *prima facie* obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art. In re Royka, 490 F.2d 981 (CCPA 1974). That is, "[a]ll words in a claim must be considered in judging the patentability of that claim against the prior art." In re Wilson, 424 F.2d 1382 (CCPA 1970). Applicants respectfully submit that the combination of Green and Kedem fails to disclose all of the claim limitations of claims 26-29, 32, 38-47, 54-61, 63-65, 69, 71, and 73, as described more fully below.

Regarding claim 26, the Examiner notes that "wherein the selection of a time is from a substantially continuous time interval, said time interval would obviously contain gaps or periods of time wherein selection is not enabled. Wherein the time interval is only substantially continuous, said time interval would not consist of every and all time points within

the time interval." Office Action, page 10. The Examiner points to paragraph [0017] of Applicants' specification, indicating that "[t]he specified time can be selected from a substantially continuous time interval.'" Office Action, page 10. Applicants respectfully note that the term "substantially" does not appear in the independent claims to describe time intervals, and therefore should not be read from the specification into the claims. Applicants also respectfully note that the specification enables restoration "of data at any prior point in time, even when the request is made at a time following the recovery time. . .," as indicated in paragraph [0011] of the specification. Further, as described more fully in previous Responses, support for the limitation "any point in time" in claim 26 may also be found at least at, for example and without limitation, paragraph [0083] ("Further, the storage management device 38 can provide a virtual volume from any time in the substantially continuous time interval, "Substantially" continuous because of the quantization limits defined by the minimum time increment.) It is clear that the continuous time interval is limited only by the "quantization limits defined by the minimum time increment." Specification, [0083].

The Examiner also asserts that "it would have been obvious to one of ordinary skill in the art that snapshots may be taken

of a primary data store in a manner which presented the capture of historical data to be continuous. . . one of ordinary skill in the art would have readily discerned that snapshots of the system could have been made in a continuous manner every minute such that a snapshot of the system at 12:15 would be available." Office Action, page 9. Applicants respectfully disagree with this characterization of Green, and respectfully note that, even if the system of Green was set to take a snapshot of a system "every minute," as suggested by the Office Action, the system would still not be able to "receiv[e] a request to create a virtual data store that reflects a state of the primary data store at a specified time, the specified time being any point in time during the time interval. . .," as recited in claim 26, as the system of Green is still limited to creating snapshots of a system at particular points of time.

Applicants respectfully submit that neither Green nor Kedem, alone or in combination, disclose, or even suggest, "receiving a request to create a virtual data store that reflects a state of the primary data store at a specified time, the specified time being any point in time during the time interval, the virtual data store being created from data stored in the original data store; [and] receiving a storage protocol request for data at a specified address in the virtual data

store. . .," as presently claimed. Specifically, and as shown in previous Responses, Green and Kedem do not disclose receiving two commands, one to create a virtual data store, and another for data at a specified address in the virtual data store. Green, as shown in previous Responses, can only restore a system to defined snapshot points in time. Also, neither Green nor Kedem disclose creating a virtual data store at "any point in time during the time interval. . .," as claimed.

In view of the foregoing, Applicants respectfully submit that claim 26 should be allowable over Green and Kedem.

Regarding claims 27-29, 32, and 38-47, these claims are dependent upon independent claim 26. If an independent claim is nonobvious under 35 U.S.C. 103, then any claim depending therefrom is nonobvious. In re Fine, 837 F.2d 1071 (Fed. Cir. 1988). Thus, since independent claim 26 should be allowable as discussed above, claims 27-29, 32, and 38-47 should also be allowable at least by virtue of their dependency on independent claim 26. Moreover, these claims recite additional features which are not disclosed, or even suggested, by the cited references taken either alone or in combination. For example, claim 28 recites that "the original data store comprises a current store and a time store." Green and Kedem, either alone

or in combination, fail to disclose or suggest this claimed feature.

Regarding claims 54, 63, 64, 69, and 73, these claims, while of differing scope and of different scope than claim 26, recite subject matter related to claim 26. Thus, the arguments set forth above with respect to claim 26 are equally applicable to claims 54, 63, 64, 69, and 73. Accordingly, is it respectfully submitted that claims 54, 63, 64, 69, and 73 are allowable over Green and Kedem for analogous reasons as set forth above with respect to claim 26.

Regarding claims 55-61 and 65, these claims are dependent upon independent claims 54 and 64, respectively. If an independent claim is nonobvious under 35 U.S.C. 103, then any claim depending therefrom is nonobvious. In re Fine, 837 F.2d 1071 (Fed. Cir. 1988). Thus, since independent claims 54 and 64 should be allowable as discussed above, claims 55-61 and 65 should also be allowable at least by virtue of their dependency on independent claims 54 and 64, respectively. Moreover, these claims recite additional features which are not disclosed, or even suggested, by the cited references taken either alone or in combination. For example, claim 59 recites "[t]he method of claim 58 wherein the original data store is implemented as a current store and a time store." Green and Kedem, either alone

or in combination, fail to disclose or suggest this claimed feature.

In view of the foregoing, it is respectfully requested that the aforementioned obviousness rejection of claims 26-29, 32, 38-47, 54-61, 63-65, 69, 71, and 73 be withdrawn.

II. THE OBVIOUSNESS REJECTION OF CLAIMS 30, 31, 33-37, 48-53, 62, 66-68, 70, and 72

On pages 6-9 of the Office Action, claims 30, 31, 33-37, 48-53, 62, 66-68, 70, and 72 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Green in view of Kedem, and in further view of Official Notice. The Examiner has provided additional guidance on what the Examiner takes as Official Notice with regard to claims 30, 31, 33-37, 48-53, 62, 66-68, 70, and 72, however Applicants continue to respectfully traverse the rejections of claims 30, 31, 33-37, 48-53, 62, 66-68, 70, and 72 in relying on Official Notice. Applicants respectfully submit that the rejections under Green and Kedem and Official Notice are moot, given the above arguments with respect to the independent claims. Applicant also traverses this rejection because there is no support in the record for the conclusion that the identified features are "old and well known." In



accordance with MPEP § 2144.03, the Examiner must cite a reference in support of his position.

Regarding claims 30, 31, 33-37, and 48-53, these claims are dependent upon independent claim 26. Regarding claim 62, this claim is dependent upon independent claim 54. Regarding claims 66-68, these claims are dependent upon independent claim 63. Regarding claims 70 and 72, these claims are dependent upon independent claim 69. If an independent claim is nonobvious under 35 U.S.C. 103, then any claim depending therefrom is nonobvious. In re Fine, 837 F.2d 1071 (Fed. Cir. 1988). Thus, since at least independent claims 26, 54, 63, and 69 should be allowable as discussed above, dependent claims 30, 31, 33-37, 48-53, 62, 66-68, 70, and 72 should also be allowable at least by virtue of their dependency the independent claims noted above. In view of the foregoing, it is respectfully requested that the aforementioned obviousness rejection of claims 30, 31, 33-37, 48-53, 62, 66-68, 70, and 72 be withdrawn.

### III. CONCLUSION

In view of the foregoing, it is respectfully submitted that the present application is in condition for allowance, and an early indication of the same is courteously solicited. The Examiner is respectfully requested to contact the undersigned by

telephone at the below listed telephone number, in order to expedite resolution of any issues and to expedite passage of the present application to issue, if any comments, questions, or suggestions arise in connection with the present application.

To the extent necessary, a petition for an extension of time under 37 CFR § 1.136 is hereby made.

Please charge any shortage in fees due in connection with the filing of this paper, including extension of time fees, to Deposit Account No. 50-0206, and please credit any excess fees to the same deposit account.

Respectfully submitted,

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